

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
MICHAEL J. LEHMKUHL*
SUZANNE C. SPINK*
MICHAEL H. SHACTER

PEPPER & CORAZZINI
L. L. P.

ATTORNEYS AT LAW
1776 K STREET, NORTHWEST, SUITE 200
WASHINGTON, D. C. 20006
(202) 296-0600

GREGG P. SKALL
E. THEODORE MALLYCK
OF COUNSEL
FREDERICK W. FORD
1909-1986

TELECOPIER (202) 296-5572
INTERNET PEPCOR@COMMLAW.COM
WEB SITE HTTP://WWW.COMMLAW.COM

* NOT ADMITTED IN D.C.

DOCKETED
March 14, 1997

RECEIVED

MAR 14 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: **Comments of Directory Dividends, Inc.**
CC Docket No. 96-115
DA 97-385

Dear Mr. Caton:

Transmitted herewith on behalf of Directory Dividends, Inc. are an original and four copies of its Comments in response to the Commission's Public Notice, Common Carrier Bureau Seeks Further Comment on Specific Questions in CPNI Rulemaking, DA 97-385, released February 20, 1997. Two copies are also being sent to Janice M. Myles at the Common Carrier Bureau and an additional copy is being sent to International Transcription Service pursuant to the Public Notice's instructions. Diskette copies are also being submitted to Ms. Myles and International Transcription Service.

Should any questions arise in connection with this matter, kindly communicate directly with the undersigned.

Respectfully submitted,



Howard J. Barr
Counsel to Directory Dividends, Inc.

cc: Ms. Janice M. Myles
International Transcription Service

RECEIVED

MAR 14 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re)
)
Telecommunications Carriers' Use)
of Customer Proprietary Network) CC Docket No. 96-115
Information and other Customer)
Information)

COMMENTS OF DIRECTORY DIVIDENDS, INC.

Directory Dividends, Inc. by counsel, hereby submits its comments in response to the Commission's request for further comments in the above-captioned proceeding.

Public Notice, Common Carrier Bureau Seeks Further Comment on Specific Questions in CPNI Rulemaking, DA 97-385, February 20, 1997. The following is shown in support thereof:

I. INTERPLAY BETWEEN SECTION 222 AND SECTION 272

A. Using, Disclosing and Permitting Access to CPNI

1. Does the requirement in Section 272(c)(1) that a BOC may not discriminate between its Section 272 "affiliate and any other entity in the provision or procurement of ... services ... and information ..." mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities? If not, what obligation does the nondiscrimination requirement of Section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

The Commission's question should be answered in the affirmative, i.e., § 272(c)(1)'s requirement that a BOC may not discriminate between its Section 272 "affiliate and any other entity in the provision or procurement of ... services ... and information ..." means that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities.

All telecommunications carriers have a "duty to protect the confidentiality of propriety information of, and relating to, customers...." Section 702(a) of the Telecommunications Act of 1996, 47 U.S.C. § 222(a). Correspondingly, that Act places strict restrictions on a telecommunications carrier's use of CPNI. Section 702(c) of the Telecommunications Act of 1996, 47 U.S.C. § 222(c).

Section 222(c)(1) provides that "except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.^{1/} Section 272(c)(1) does not establish additional instances in which a telecommunications carrier, including a BOC or its affiliates, may use CPNI or in any way modify the restrictions on CPNI use. It simply "details the nondiscrimination safeguards" applicable to the BOC/affiliate relationship. Senate Report. These safeguards merely supplement those set forth in §222(c)(3). Thus, any use, disclosure, or access to CPNI in addition to those uses permitted under § 222(c)(1) remains subject § 222(c)(3)'s requirement that it be made available to other parties.

^{1/} The Commission has tentatively concluded to narrowly construe § 222(c)(1). Telecommunications Carriers' Use of Customer Propriety Network Information and Other Customer Information (NPRM), FCC 96-221, 3 CR 2249, 2253 ¶¶ 20-26 (1996).

For example, a BOC, by through or on behalf of its directory services affiliate, may wish to use the addresses of its new and/or relocating customers, including those with listed and unlisted numbers, to provide such customers with advertising materials (provided by local and/or national merchants) along with the directory it commonly provides such customers. These addresses "relate[] to the ... type [and] destination ... of a telecommunications service subscribed to by [a] customer of a telecommunications carrier, and ... [are] made available to the carrier by the customer solely by virtue of the carrier-customer relationship" and therefore constitute CPNI. Section 702(f)(1) of the Telecommunications Act of 1996, 47 U.S.C. § 222(f)(1).

Use of those addresses in such a fashion would violate § 222(c)(1)'s nearly absolute restriction on the use of such information, since such use is not required by law and does not fall within either of § 222(c)(1)'s exceptions; unless the customer's prior written approval is obtained or unless such information were aggregate customer information^{2/} and such aggregate customer information is made available to other carriers or persons on reasonable and non-discriminatory terms and conditions upon reasonable request therefore.

Bell Atlantic Directory Services, Inc. ("BADs") has just such a program, known as Direct Value\$, pursuant to which it distributes advertising material to new and/or relocating telephone customers, including those with listed and unlisted numbers, along

^{2/} "The term 'aggregate customer information' means collective data that relates to a group or category of services or customers, from which individual customer identifies and characteristics have been removed." Section 202(f)(2) of the Telecommunications Act of 1996, 47 U.S.C. - § 222(f)(2).

with the telephone books it delivers to such customers. Directory Dividends has requested access to the addresses of this category of customers on the same terms and conditions as they are provided to BADS, on the premise that the Direct Value\$ program makes use of aggregate customer information. Attachment I hereto, Letter of January 29, 1997 from Howard J. Barr, Esq. to Brian X. Gaul, Esq.

BADS contends, however, that the information is not aggregate customer information as that term is defined in the Act and therefore not subject to the Act's disclosure provisions and refuses to make such information available. Attachment II hereto, Letter of February 7, 1997 from Brian X. Gaul, Esq. to Howard J. Barr, Esq. Assuming that to be true, then BADS has no right to use the CPNI in connection with its program and to do so is in violation of § 222(c). NPRM, 3 CR at 2252-53 ¶20.

Section 271(c)(1) does not change the result. It does not establish an additional category of permissible uses of CPNI or aggregate customer information. Those categories are contained wholly within § 222. Section 271(c)(1) merely establishes nondiscrimination safeguards applicable to the BOC/affiliate relationship, which merely supplement those set forth in § 222(c)(3).

While BADS may make subscriber list information available for the purpose of directory publishing (which information may not be used for advertising purposes) and license certain other information for direct mail and telemarketing use, such information is not the equivalent, functional or otherwise, of the CPNI used in the Direct Value\$ program. CPNI used in the Direct Value\$ program is the freshest information BADS has on hand, typically no more than three days old. Any other information obtainable

from BADS is long dated by comparison and any information distributed using such dated information does not provide nearly the bang for the buck that can be obtained with the CPNI used in the Direct Value\$ program.

Additionally, unlike the CPNI used in the Direct Value\$ program, the information licensed for direct mail and telemarketing does not allow access to unlisted customers. According to national figures, depending upon the jurisdiction, between 31% and 62% of subscribers opt for an unlisted number. Since Directory Dividends is permitted access only to information licensed for direct mail and telemarketing, it is denied access to a significant portion of the BOC's subscriber base, in violation of the Act's non-discrimination requirements.

Additionally, while BADS will accept material for delivery with its telephone directories, it will do so only in connection with orders accepted through the Direct Value\$. BADS ability to reject Directory Dividend's material does not allow Directory Dividends to compete on equal terms and conditions and is therefore unreasonable and discriminatory. If the addresses of customers receiving Direct Value\$ or similar information cannot be released to third parties wishing to deliver similar information to such customer, then the carrier should be required to accept such information from such third parties for delivery on reasonable and non-discriminatory terms and conditions.

2. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), does the nondiscrimination requirement of section 272(c)(1) mandate that a BOC's section 272 affiliate be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate?

That question should be answered in the affirmative, i.e., the BOC's § 272 affiliate must be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate. Any other treatment would be in violation of § 272(b)'s structural and transactional separation requirements; Most particularly, § 272(b)(1), which requires the BOC and its affiliate to operate independently of one another, and § 272(b)(5), which requires that a BOC and its separate affiliate "conduct all transactions ... on an arm's length basis ..." These provisions would be rendered meaningless were the affiliate not treated as a third party.

The provision is consistent with both the pro-competitive nature of the Act, and with the prohibition on a carrier's use of aggregated customer information unless such information is provided to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefore. Both requirements spur competition by requiring disclosure of certain information in particular instances to entities in competition with the carrier.

B. Customer Approval

4. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request before a carrier may use, disclose or permit access to CPNI, must a BOC disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its Section 272 affiliate.

Section 222(c)(1) makes it plain that, "except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains [CPNI] by virtue of its provision of a telecommunications service shall only use, disclose or permit access to individually identifiable [CPNI] in its provision of (A) the telecom-

munications service from which such information is derived or (B) services necessary to, or used in, the provision of such telecommunications service. Section 702(c)(1) of the Telecommunications Act of 1996, 47 U.S.C. § 222(c)(1). The Commission should apply an affirmative written request standard to disclosures made pursuant to § 222(c)(1). Anything less will diminish the Commission's ability to enforce the basic requirement, except in limited instances, that customer approval is required prior to the use or disclosure of CPNI.

The Commission need only look at its experience with PIC changes to remind itself that anything short of written verification of the customer's authorization is subject to abuse.^{3/} After initially requiring signed letters of agency ("LOA") before a PIC change could be submitted to a local exchange carrier ("LEC") on behalf of the customer,^{4/} the Commission revised its rules to allow initiation of PIC changes if the interexchange carrier ("IXC") merely "instituted steps to obtain signed LOAs."^{5/} Numerous complaints about unauthorized PIC changes then led the Commission to require IXCs, prior to submitting PIC changes, to either (1) obtain the customer's written authorization; (2) obtain the customer's electronic authorization by use of an 800

^{3/} Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) (Allocation Order), recon. denied, 102 FCC 2d 503 (1985) (Reconsideration Order); Investigation of Access and Divestiture Related Tariffs, Phase I, 101 FCC 2d 935 (1985) (Waiver Order); Policies and Rules Concerning Long Distance Carriers, 7 FCC Rcd 1038 (1992) (PIC Change Order), recon. denied, 8 FCC Rcd 3215 (1993); Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, 10 FCC Rcd 9560 (1995) (LOA Order), recon. pending.

^{4/} Allocation Order, 101 FCC 2d at 929.

^{5/} Waiver Order, 101 FCC 2d at 942.

number; (3) have the customer's oral authorization verified by an independent third party; or (4) send an information package, including a prepaid returnable postcard, within three days of the customer's request for a change, and wait fourteen days before submitting the PIC change to the LEC.^{6/} Continued concerns then led the Commission to prescribe the general form and content of the LOA used to authorize a PIC change.^{7/} The Commission should save itself the administrative expense and require written verifiable customer authorizations in this context.

Section 222(c)(2) makes it plain that carrier's are required to disclose CPNI upon a customer's affirmative written request. The Commission should recognize that § 222(c)(2) does not confer rights on the carrier; but rather on the customer.

That section provides:

DISCLOSURE ON REQUEST BY CONSUMERS.--- A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

See also Senate Report. Rather than conferring rights upon the carrier, it imposes an affirmative obligation to disclose. Section 222(c) can be contrasted with § 222(d) which "asserts carriers' rights ... to use CPNI to initiate, render, bill and collect for telecommunications service." Senate Report.

The provision is consistent with both the pro-competitive nature of the Act, and with the prohibition on a carrier's use of aggregated customer information unless such information is provided to other carriers or persons on reasonable and nondiscriminatory

^{6/} PIC Change Order, 7 FCC Rcd at 1045; Section 64.1100 of the Commission's Rules, 47 C.F.R. § 64.1100.

^{7/} LOA Order, supra.

terms and conditions upon reasonable request therefore. Both requirements spur competition by requiring disclosure of certain information in particular instances to entities in competition with the carrier.

CONCLUSION

Wherefore, the premises considered, Directory Dividends, Inc. respectfully requests that the Commission consider its comments in the course of this proceeding.

Respectfully submitted,

DIRECTORY DIVIDENDS, INC.

By



Howard J. Barr
Its Counsel

PEPPER & CORAZZINI, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
202/296-0600

March 14, 1997

HJB/de
f:\wp\2537\comments.hjb

ATTACHMENT I

VINCENT A. PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
MICHAEL J. LEHMKUHL *
SUZANNE C. SPINK *
RONALD G. LONDON *
MICHAEL H. SHACTER
* NOT ADMITTED IN D.C.

PEPPER & CORAZZINI
L. L. P.

ATTORNEYS AT LAW
1776 K STREET, NORTHWEST, SUITE 200
WASHINGTON, D. C. 20006
(202) 296-0600

FILE COPY 2537

GREGG P. SKALL
E. THEODORE MALLORY
OF COUNSEL
FREDERICK W. FORD
1909-1986

TELECOPIER (202) 296-5572
INTERNET PEPCOR@COMMLAW.COM
WEB SITE HTTP://WWW.COMMLAW.COM

January 29, 1997

Brian X. Gaul, Esq.
Counsel, Directory Services
Bell Atlantic Network Services, Inc.
6404 Ivy Lane, Suite 800
Greenbelt, MD 20770

Dear Mr. Gaul:

We represent Directory Dividends, Inc., formerly a sales agent for Bell Atlantic's Direct Value\$ directory ride-along marketing program.

It is our understanding that, pursuant to the Direct Value\$ marketing program, Bell Atlantic distributes advertising material to new or relocating telephone customers along with the telephone books Bell Atlantic delivers to such customers. It is our opinion that this program involves Bell Atlantic's use of aggregate customer proprietary network information ("Aggregate CPNI") as that term is defined in § 222(f)(1) and (2) of the Communications Act of 1934, as amended, 47 U.S.C. § 222(f)(1) and (2).

Pursuant to § 222(c)(3) of that Act, a local exchange carrier may use, disclose or permit access to aggregate customer information other than for purposes of the provision of telecommunications service from which the information is derived or services necessary to, or used in, the provision of such telecommunications services only if it provides such aggregate information to other carriers or persons on reasonable and non-discriminatory terms and conditions upon reasonable request therefore. Unless Bell Atlantic makes available on reasonable and non-discriminatory terms and conditions the Aggregate CPNI it uses in connection with its Direct Value\$ program, it would appear that Bell Atlantic is in violation of § 222(c)(3).

By its letter of December 11, 1996 to David Dague, Directory Dividends requested information concerning Bell Atlantic's Aggregate CPNI. Mr. Dague claims both to have never received this letter and to not understand the nature of Directory Dividend's request.

Directory Dividends seeks access, on reasonable and non-discriminatory terms and conditions, to that Aggregate CPNI

Brian X. Gaul, Esq.
January 29, 1997
Page 2

utilized by Bell Atlantic in the distribution of its telephone books to new and relocating customers. More specifically, Directory Dividends seeks the terms and conditions upon which such information is made available as well as the terms and conditions upon which Bell Atlantic will associate and deliver Directory Dividends supplied information with its telephone books. You may provide such information directly to my client in care of Duane Malm, 222 West Lancaster Avenue, Suite 253, Devon, PA 19333 with a copy to me at the above address.

Please call me if you have any questions.

Very truly yours,



Howard J. Barr

cc: Mr. Duane Malm
Lawrence W. Katz, Esq.

HJB/de
f:\wp\2537\Gaul1.hjb

ATTACHMENT II

Bell Atlantic Directory Services, Inc.
6404 Ivy Lane
Greenbelt, MD 20770
Voice: 301-513-1896
Fax: 301-220-5027

Brian X. Gaul
Counsel

February 7, 1997

BY FAX AND U. S. MAIL

Howard J. Barr, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006

Dear Mr. Barr:

I am writing in response to your January 29, 1997 letter about Bell Atlantic's use of new and relocating customer names and addresses to deliver our telephone books. You contend that this information constitutes aggregate customer information that Bell Atlantic is required to make available to your client under Section 222 of the Communications Act.

Section 222 (f)(2) defines aggregate customer information as "collective data . . . from which individual customer identities and characteristics have been removed." The information you refer to is not collective data, nor have the individual customer identities and characteristics been removed. Accordingly, the information is not aggregate customer information under the definition in the Act and the disclosure provisions of Section 222 (c) (3) are inapplicable.

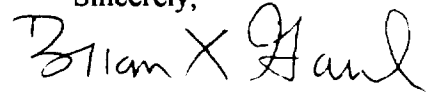
We have previously sent your client a copy of our standard directory publishers license agreement. I believe that your client is also aware of the availability of certain listing information that Bell Atlantic licenses for direct mail and telemarketing use in certain jurisdictions.

You also ask for a description of the terms and conditions upon which Bell Atlantic will deliver your client's material with our telephone directories. We accept material for delivery with Bell Atlantic telephone directories only in connection with orders accepted through our Direct Values program. Your client already has our order form, which includes our standard terms and conditions.

Howard J. Barr, Esq.
February 7, 1997
Page 2

I hope this provides you with the information you need. If you have any questions, please give me a call.

Sincerely,

A handwritten signature in black ink that reads "Brian X. Gaul". The signature is written in a cursive style with a large, stylized "B" and "G".

Brian X. Gaul

cc: Duane Malm (by mail)
Larry Katz (by co. mail)

RECEIVED

FEB 10 1997